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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1083

In the Matter of)
)
RCC MINNESOTA, INC.)
)
Application for Designation as an Eligible)
Telecommunications Carrier, Pursuant to)
the Telecommunications Act of 1996.)

ORDER

**DISPOSITION: APPLICATION FOR RECONSIDERATION DENIED;
MOTION TO STRIKE RESPONSE GRANTED.**

On June 24, 2004, the Commission issued Order No. 04-355, granting RCC Minnesota, Inc. (RCC) status as an eligible telecommunications carrier (ETC) within the designated area for which it applied. On August 20, the Oregon Telecommunications Association (OTA), an intervenor in the case, filed an application for reconsideration, arguing that the Commission erroneously determined that RCC had provided sufficient evidence of its intent to serve the area in which it was designated as an ETC. On September 7 and 8, RCC and Staff respectively, filed replies in opposition to the application.

Then, on September 15, 2004, OTA filed a response. On September 20 and 21, RCC and Staff respectively, filed motions to strike OTA's response on the grounds that the statutes and rules governing reconsideration do not permit the applicant to file a response. On September 22, OTA filed responses to both motions, and on September 28, Staff and RCC filed responses.

Motion to Strike Response

We first address whether to consider OTA's response, filed on September 15, 2004. Oregon Administrative Rule 860-014-0095 provides for an application for reconsideration, specifies the format it must take, allows for a reply, and sets a deadline for Commission action. In its September 22 response to RCC, OTA argues, "the practice before the Commission is evolving to where the third or 'reply' round is often filed." OTA Response at 2 (Sept. 22, 2004). In its September 22 response to Staff's motion, OTA also makes substantive arguments regarding its application for reconsideration.

Staff replies that the rules allow for three rounds of briefing where there is a motion, response, and reply, but that no third round is permitted in applications for reconsideration.

We agree that no third round of briefing may be filed where there is an application for reconsideration. The administrative rule allows for an application and reply. Adhering to that limit is important so that the Commission has time to carefully consider the application and render a decision within the sixty-day time limit. If an applicant feels that its position has been wrongly construed by the reply, it may move for leave to file another brief, but that motion will be considered in light of the time constraints on the Commission. OTA cites CP 1242 and UM 1140 as examples in which three rounds of briefing are permitted. OTA fails to mention that all parties agreed to the schedule in those dockets. No motion for leave to file another brief was filed in this case nor did the parties agree to the extra filing.

In keeping with the rules, and to allow the Commission sufficient time to consider the application for reconsideration, we will not consider the third round of briefing, nor the additional arguments that OTA made in its September 22 response to Staff's Motion to Strike. We will consider the application and Staff's and RCC's responses.

Application for Reconsideration

Rule 860-014-0095(3) sets out the standard, which must be met for an application to reconsider to be granted:

The Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:

- (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
- (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
- (c) An error of law or fact in the order which is essential to the decision; or
- (d) Good cause for further examination of a matter essential to the decision.

OTA does not explicitly state which factor it relies upon in requesting reconsideration of Order No. 04-355, but from the application, we infer that OTA believes that we made an error of law or fact in finding that designation of RCC as an ETC in areas served by rural carriers is in the public interest, or that the erroneous finding results in good cause to reconsider the order. OTA argues that the Commission erred in "its conclusion that the applicant has demonstrated sufficient intent and ability throughout the area for which it seeks designation as an eligible telecommunications carrier." Application at 2. Citing federal

statutes and decisions by the Federal Communications Commission (FCC), OTA asserts that RCC's commitment to build cell sites in Bonanza, La Grande, Prairie City, and Ontario is not evidence of its intention to serve the service areas of rural telephone companies within a reasonable time.¹

RCC counters that OTA cited only a narrow portion of the evidence in the record. RCC notes additional evidence in the record that shows RCC's current service to customers in areas served by rural telephone companies and its plans to construct "a complete overlay of RCC's existing network with a next generation digital platform." RCC Reply at 5. RCC also reiterates its commitment to serve every customer who asks for service either through its own facilities or resale of another's facilities, by using a six-point checklist, and by filing reports to the Commission on customer requests for service that RCC was unable to fill. As for OTA's argument that the proposed new cell sites are in areas served by non-rural telephone carriers, RCC contests that statement and asserts that the cell tower signals cross wire center boundaries and will serve customers in other areas. RCC also challenges OTA's argument, stating that the law does not require, and no jurisdiction has required, an ETC "to construct facilities throughout their authorized service areas within a regulator-imposed time limit." RCC Reply at 9.

Staff also opposes OTA's application. First, Staff argues that OTA misinterprets 47 USC § 254(e) and that RCC is not obligated to use the funds in the specific area for which the funds were acquired broken down by carrier, citing FCC decisions in *Virginia Cellular*,² *Highland Cellular*,³ and *Nextel*⁴ in support. Second, Staff contests OTA's argument that RCC's service must be ubiquitous and immediate. Instead, Staff contends that the legal standard is that RCC must commit to provide service within the designated area based on customer requests and within a reasonable time frame.

We begin with the statutes and cases cited by OTA in support of its arguments. 47 USC § 254(e) states, in part, "A carrier that receives [federal universal service] support

¹ OTA also quotes from the Commission's comments to the FCC and infers from those comments "that the Commission itself recognizes that there is a problem with its decision in this case." Application at 7. Those comments are not in the record, nor did OTA request that we take official notice of those comments. We agree with Staff's position that the comments are not relevant because they refer to declining service in rural areas served by non-rural carriers, not areas served by rural carriers. Those comments do not support OTA's arguments regarding how designation of additional ETCs in areas served by rural carriers harm those rural incumbent carriers. For these reasons, we decline to consider our comments before the FCC.

² *In re Federal-State Joint Board on Universal Service, Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, FCC 03-338, 19 FCC Rcd 1563 (released Jan 22, 2004) (*Virginia Cellular*).

³ *In the Matter of Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, FCC 04-37, 19 FCC Rcd 6422 (released April 12, 2004) (*Highland Cellular*).

⁴ *In the Matter of Federal-State Joint Board on Universal Service; NPCR, Inc. d/b/a Nextel Partners; Petition for Designation as an Eligible Telecommunications Carrier in Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia*, DA 04-2667, 2004 FCC Lexis 4770 (released August 25, 2004) (*Nextel*).

shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." The FCC applied this provision warning,

[T]he [FCC] may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support it receives is being used "only for the provision, maintenance, and upgrading of facilities and services" *in the areas where it is designated as an ETC*.

Virginia Cellular at ¶ 46 (emphasis added). The FCC used similar language as recently as August, 2004. *See Nextel* at ¶ 24. We adhere to the FCC's interpretation that universal service funds should be used to improve facilities within designated ETC areas, and not be spent by telecommunications carrier service area or wire center.

OTA also cites *Virginia Cellular*, which states that benefits and costs should be weighed in determining whether designation of an additional ETC is in the public interest, considering "the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame." *Virginia Cellular* at ¶ 28. We considered each of these factors in granting ETC status. *See Order No. 04-355* at 8-11. Specifically, we noted that RCC has committed to serve every customer that requests service following a six-point procedure. If it is unable to serve a customer using its own facilities, RCC will attempt to serve the customer through resale of another company's facilities, for which it will receive no universal service support. RCC does not receive funds unless it serves customers in high-cost areas, so RCC has an incentive to improve its service in those areas. A similar commitment by *Virginia Cellular, LLC*, satisfied the FCC. *See Virginia Cellular* at ¶ 15. Further, in determining that *Nextel's* designation was in the public interest in areas served by rural carriers, the FCC stated that it had

already determined that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC. Moreover, *Nextel* has committed to improve its network and reach out to areas that it does not currently serve.

Nextel at ¶ 19. RCC has made a similar commitment here, which we have already approved. *See Order No. 04-355* at 10-11.

We note again that RCC only receives funding for the customers it serves with its own facilities based on the rate paid to the incumbent telecommunications carrier that serves the customer. If RCC does not serve customers in areas served by rural carriers, it does not receive high cost support based on the support paid to those rural carriers. RCC has stated, and we have found the statements credible, that it will serve customers who request service to the best of its ability, following a six-point process. Order No. 04-355 at 10. RCC will further use the funds to improve its facilities throughout the area in which it was designated an ETC, in accordance with federal statutes and FCC decisions. *See id.* For these reasons, we find that OTA's application for reconsideration does not raise an error of law or fact, nor does it provide good cause to reconsider our order.

ORDER

IT IS ORDERED that the application for reconsideration is denied.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may appeal this order to a court pursuant to ORS 756.580.